IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-1460

HARRY FRANKLIN PHILLIPS,

Petitioner,

vs.

MICHAEL W. MOORE, Secretary,
Department of Corrections, State of Florida,

Respondent.

ON PETITION FOR
WRIT OF HABEAS CORPUS

RESPONSE

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INTRODUCTION

Petitioner will be referred to as Defendant. The prosecution and Respondent will be referred to as the State. The symbols “D.A.R.” and “D.A.T.” will refer to record on appeal and transcript of proceeding from Defendant’s direct appeal, Florida Supreme Court Case No. 64,883, respectively. The symbol “PCR1.” will refer to the record on appeal from the denial of Defendant’s first motion for post conviction relief, Florida Supreme Court Case No. 75,598. The symbols “RSR.” and “RST.” will refer to the record on appeal and transcript of proceedings from the appeal after resentencing, Florida Supreme Court Case No. 83,731. The symbol “RSSR.” will refer to the supplemental record on appeal from that proceeding. The symbols “PCR2.” and “PCR2-SR.” will refer to the record on appeal and supplemental record on appeal from this proceeding.

STATEMENT OF THE CASE AND FACTS

In accordance with Fla. R. Crim. P. 3.851(b)(2), this petition is being pursued concurrently with the appeal from the order denying Defendant's motion for post conviction relief. *State v. Phillips*, No. SC00-2248. The State will therefore rely on its statements of the case and facts contained in its brief in that matter.

ARGUMENT

I.

APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE AN ISSUE REGARDING THE ADMISSION OF HEARSAY BECAUSE HE DID RAISE THE ISSUE AND THE ISSUE WAS UNPRESERVED AND MERITLESS.

Defendant next asserts that his appellate counsel was ineffective for failing to raise an issue regarding the admissibility of certain hearsay statements. However, this issue is meritless because counsel did raise this issue on appeal, because underlying issue was unpreserved and because underlying issue was meritless.

In the resentencing appeal, Defendant's counsel did raise the admission of hearsay as an issue. Initial Brief of Appellant, Case No. 83,731, at 91-94. This Court rejected the claim procedurally barred or without merit. *Phillips v. State*, 705 So. 2d 1320, 1321 (Fla. 1997). As such, counsel cannot be deemed ineffective for failing to do what he in fact did. Moreover, asserting different arguments in support of an issue that was raised on direct appeal or claiming that the argument that was made was inadequate are not grounds to reconsider the rejection of an issue. *Thompson v. State*, 759 So. 2d 650, 657 n.6 (Fla. 2000). As such, this claim should be rejected.

Even if counsel had not raised the issue on appeal, counsel

could still not be deemed ineffective for failing to raise this issue. Appellate counsel cannot be deemed ineffective for failing to raise an issue that was not preserved. *Groover v. Singletary*, 656 So. 2d 424 (Fla. 1995); *Hildwin v. Dugger*, 654 So. 2d 107 (Fla.), *cert. denied*, 516 U.S. 965 (1995); *Breedlove v. Singletary*, 595 So. 2d 8, 11 (Fla. 1992). Nor may counsel be considered ineffective for failing to raise an issue that was without merit. *Kokal v. Dugger*, 718 So. 2d 138, 143 (Fla. 1998); *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

Prior to resentencing, the State moved in limine to admit hearsay evidence to place this crime in perspective and to prove the prior violent felony aggravator. (RSR. 71-81) At the hearing on the motion, Defendant conceded that the motion was well taken, and the trial court granted the motion. (RST. 14)

During his opening statement, Defendant started to argue that the evidence was insufficient to convict him. (RST. 267-68) The State objected, and the trial court sustained the objection. (RST. 268-69) Defendant then started to talk about the fact that certain witnesses against him from the guilt phase had been incarcerated. (RST. 269) The State again objected. (RST. 269) At sidebar, Defendant asserted that he was simply trying to rebut the State evidence of guilt. (RST. 269-70) The

trial court informed Defendant that he was not allowed to present evidence of lingering doubt and sustained the objection. (RST. 269-70)

When Det. Smith was started to testify regarding his interview with Malcom Watson, Defendant did not object nor did he object during the course of the testimony. (RST. 410-12) Det. Smith then related that Watson has stated that Defendant had attempted to borrow $50 from him using a .38 or .357 revolver as collateral in the fall of 1980. (RST. 411) Watson refused to engage in the transaction. (RST. 411) Defendant then informed Watson that he was having a problem with his parole officers because they were attempting to violate his parole on technical grounds. (RST. 411)

Det. Smith stated that Watson again saw Defendant in the jail in September 1982. (RST. 412) At that time, Watson was aware of Svenson's murder and made a statement to Defendant to the effect that Defendant had finally done it. (RST. 412) Defendant responded, "Yes, they got to prove it and they can't prove it." (RST. 412)

Det. Smith then testified that he was contacted a couple days after the murder by an inmate from the Dade County Jail named Will Scott/Smith, who indicated that he had information about the case. (RST. 412-13) Scott/Smith indicated that he had

known Defendant for a number of years. (RST. 413-14) When Scott/Smith saw Defendant in the jail after the murder, Defendant indicated that he was there because he had "downed one of those mother fuckers." (RST. 414) Defendant did not object to this testimony.

Det. Smith next testified that he interviewed another inmate by the name of Tony Smith. (RST. 414) Smith indicated that he was at a bar with Defendant and other individuals on probation or parole in August 1982. (RST. 414-15) Defendant indicated that he was upset because a male and a female parole officer had been hassling his mother and himself. (RST. 415) Defendant stated that he had shot at the female parole officer but missed. (RST. 415) Defendant stated that he was going to end the hassling. (RST. 415) At that time, Defendant had a silver or chrome .38 or .357 revolver with him. (RST. 415) Again, Defendant did not object to this testimony. (RST. 415)

Det. Smith testified that Defendant had denied knowing Watson or Scott/Smith. (RST. 428) Defendant also denied ever making any inculpatory statements about this case to anyone. (RST. 428)

After extensively questioning Det. Smith, over the State's objection, about the physical evidence and testimony of witnesses to the crime, Defendant asked for a sidebar. (RST.

437-47) At sidebar, Defendant indicated that he wanted to question Det. Smith regarding the custody status of Watson, Scott/Smith and Smith, the nature of the charges against these individuals and the disposition thereof. (RST. 447-48) The State objected, and the trial court indicated that it wanted to hear a proffer of this testimony before ruling. (RST. 448)

After Det. Smith's testimony concluded, Defendant gave his proffer. (RST. 450) During the proffer, Det. Smith reiterated that Watson was in jail. (RST. 451) Det. Smith knew that Watson was serving a long sentence for a robbery. (RST. 451) After Watson testified, the State stipulated to a reduction of Watson's conviction from armed robbery to strong armed robbery, which resulted in a reduction of his sentence. (RST. 452) The document showed that Watson's original life sentence was vacated, that the remainder of his new sentence was suspended, and that he was placed on probation. (RST. 453) With regard to Smith, it was proffered that he was in custody based on alleged probation violations for committing new crimes. (RST. 454) Smith was reinstated to probation with a special condition that he testify against Defendant. (RST. 454) With regard to Scott/Smith, he was in custody on a parole violation and had a new assault charge. (RST. 454-55)

At the time of trial, the only promises that had been made

to these individuals was that a letter would be sent to the parole board. (RST. 455) They were unaware that the State would do anything else for them at the time they testified. (RST. 455)

After listening to the proffer, the trial court felt that this merely went to lingering doubt. (RST. 456) As such, the lower court found this evidence inadmissible over Defendant's claim that he was simply trying to rebut the admissible hearsay. (RST. 456)

On rebuttal, Det. Smith testified that he met with an inmate from the Dade County Jail named Larry Hunter, who stated that Defendant had admitted killing Svenson and asked for Hunter's assistance in falsifying an alibi. (RST. 670-71) Defendant did object to Det. Smith testifying about Hunter. (RST. 670) However, Defendant's objection was "I object now on the grounds that this constitutes -- were on pretrial."[1] (RST. 670) Defendant had given Hunter four notes about this alibi, which were admitted over Defendant's "renewed" objection. (RST. 672-75) Det. Smith also received the Bro White letter from Hunter, who had gotten it from Edward White, another inmate in the jail. (RST. 676-79) The individuals named in the Bro White letter had

[1] As Defendant had agreed pretrial that hearsay was admissible, it is not clear what this passage means. (RST. 14)

been listed as witness in discovery by the State. (RST. 679-80) When the State asked Det. Smith about whether the names in the Bro White letter were on the State's witness list, Defendant again renewed his objection. (RST. 679)

Det. Smith then testified that Defendant had told Scott/Smith that he had disposed of the gun and that the police would not find it. (RST. 680) Defendant objected to this testimony on the grounds that it was irrelevant and not proper rebuttal. (RST. 680) Det. Smith stated that Defendant had told Watson that he had killed Svenson to avoid going to prison and that he had warned the parole officers prior to shoot at one of their houses. (RST. 681) Defendant's objection that this testimony was cumulative was overruled. (RST. 681-82) Defendant had also told Watson that he had disposed of the gun, that the police would not find it, that there were no witnesses who could identify him, that the State could not prove he had killed Svenson and that he would kill Watson and his family if Watson testified again him. (RST. 682-83) Defendant's objections that the threat was a nonstatutory aggravator and outside the scope of rebuttal were overruled. (RST. 682)

On cross, Defendant elicited that Hunter had recanted his testimony and that Hunter had been in jail facing sexual battery charges when he testified. (RST. 685) Defendant also admitted

Hunter's 1987 affidavit, which stated that Defendant had never confessed, that they had never discussed the murder, that Det. Smith and the prosecutor arranged for Hunter to receive a sentence of 5 years probation after he testified and that Det. Smith gave him $200. (RST. 686)

On redirect, Det. Smith explained that Hunter had signed the affidavit because he was pressure and threaten by Defendant's prior counsel, that Hunter had since stated that the affidavit was false and had refused to testify in accordance with it. (RST. 687) Det. Smith admitted that he had given $200 to Hunter after the case was over. (RST. 687) The money came from a reward provided by the probation department and none of the witnesses knew of the reward until after they had testified at trial. (RST. 687-88) Det. Smith denied having convinced Hunter to lie at trial. (RST. 688)

As can be seen from the foregoing, Defendant agreed that hearsay was admissible at the penalty phase and either did not object to the introduction of this evidence at all or objected on grounds other than that the evidence was irrelevant or unduly prejudicial. As such, this issue was not preserved. *Castor v. State*, 365 So. 2d 701 (Fla. 1978); *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982)(objection must be based on same grounds raised on appeal for issue to be preserved). Thus, appellate

counsel cannot be deemed ineffective, and the claim should be denied.

In an attempt to claim that this issue was preserved, Defendant refers to a pretrial motion in limine regarding the introduction of nonstatutory aggravating circumstance. (RSR. 110-15) However, this motion concerned the introduction of evidence regarding Defendant's parole history on the grounds that such evidence was only relevant to motive, which Defendant asserted was not at issue during resentencing. The motion had nothing to do with the introduction of the statements by the inmates to Det. Smith and, therefore, did not discuss the relevancy or prejudicial nature of such statements. As such, this motion did not preserved the issues about with Defendant now complains. *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982)(objection must be based on same grounds raised on appeal for issue to be preserved). As the pretrial motion did not raise the issue presently presented, the reference to it likewise did not preserve the issue. *Steinhorst*. Thus, the issue was not preserved, counsel was not ineffective and the claim should be denied.

Even if the issue had not been raised on appeal and had been preserved, the claim should still be denied, as it is meritless. This Court has recognized that evidence regarding the guilt of

Defendant may be admitted at a resentencing to familiarize the jury was the facts of the case. *Teffeteller v. State*, 495 So. 2d 744, 745 (Fla. 1986). This Court explained that the admission of such evidence was proper because "[w]e cannot expect jurors impaneled for capital sentencing proceedings to make wise and reasonable decisions in a vacuum." *Id.*; *see also Wike v. State*, 698 So. 2d 817, 821 (Fla. 1997); *Bonifay v. State*, 680 So. 2d 413, 418 (Fla. 1996). Moreover, the State can present evidence to prove the aggravating circumstances beyond a reasonable doubt. *See Valle v. State*, 581 So. 2d 40, 45 (Fla. 1991). Additionally, this Court has sanctioned the use of hearsay testimony in order to achieve this purpose. *See Chandler v. State*, 534 So. 2d 701, 702-03 (Fla. 1998); *Lawrence v. State*, 691 So. 2d 1068, 1073 (Fla. 1997). Here, the statements were relevant to show the circumstances of the crime, to prove CCP and hinder governmental function and to rebut the claim that Defendant was too dumb to have planned this killing. Moreover, rebuttal of this testimony was offered. Evidence was presented that Defendant had denied making any statements to the witnesses. (RST. 428) The fact that all of these witnesses were incarcerated at the time of the statements was presented, as was the nature of the offenses that they had committed. Defendant was allowed to present Hunter's affidavit recanting his trial

testimony. The jury was informed that the witnesses had shared in a reward. As such, this evidence was properly admitted, and appellate counsel was not ineffective for failing to raise this meritless issue. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

Defendant also appears to assert that appellate counsel was ineffective for failing to contend that he should have been able to present evidence to rebut Det. Smith's testimony regarding the statements. However, appellate counsel was not ineffective for failing to raise this nonmeritorious issue. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

With regard to the exclusion of the proffered testimony regarding Watson, Smith and Scott/Smith, the trial court did not abused its discretion in excluding this testimony. Defendant sought to elicit testimony about Watson regarding events that occurred after trial and that were not part of the agreement in exchange for his testimony. (RST. 451-53, 455) In fact, on the appeal from the denial of the first post conviction motion, this Court found that this information was not relevant to Watson's credibility. *Phillips v. State*, 608 So. 2d 778, 780 & n.1 (Fla. 1992). As such, they did not affect the credibility of Watson's

trial testimony and were properly excluded. *See Foster v. State*, 614 So. 2d 455, 460 (Fla. 1992)(evidence that witness had committed additional crimes after he had testified at trial properly excluded as irrelevant to the trial testimony). With regard to Scott/Smith and the testimony about the charges again Smith, Defendant merely sought to have Det. Smith reiterated his direct testimony regarding why Scott/Smith and Smith were in the jail. (RST. 412-13, 454-55) As such, the trial court did not abuse its discretion in excluding this cumulative testimony. *Blackwood v. State*, 777 So. 2d 399, 411 (Fla. 2000). Thus, appellate counsel cannot be deemed ineffective, and the claim should be denied. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

With regard to William Fraley, Defendant never attempted to elicit any information to rebut Fraley and did not proffer any such evidence. As such, this issue was unpreserved. *Blackwood v. State*, 777 So. 2d 399, 410 (Fla. 2000); *Finney v. State*, 660 So. 2d 674, 684 (Fla. 1995). Moreover, there was not need to rebut Fraley's statement; Fraley's statement was not admitted at resentencing. In fact, the only references to Fraley was that his name appeared in the Bro White letter and was on the State's witness list. (RST. 678-80) As such, there was no need to rebut Fraley's statement. Thus, appellate counsel cannot be deemed

ineffective, and the claim should be denied.

With regard to rebuttal regarding Hunter, the trial court did in fact admit this evidence. Defendant was permitted without objection to admit Hunter's affidavit from the post conviction proceedings. (RST. 686, RSR. 163-67) Through the affidavit and the testimony regarding it, the jury was aware that Hunter had received a reduced sentence and that he and the other witnesses had been given reward money after their testimony. (RST. 685-89) As this testimony was admitted, appellate counsel cannot be deemed ineffective for failing to complain of its exclusion. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

II.

APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CONTEND THAT IMPOSITION OF THE DEATH PENALTY ON THE MENTALLY RETARDED WAS UNCONSTITUTIONAL.

Defendant next asserts that his counsel was ineffective for failing to assert on appeal that it was unconstitutional to execute him because he was mentally retarded. However, this issue was not preserved and was without merit.

At resentencing, trial counsel did not assert that sentencing Defendant to death was unconstitutional because he was mentally retarded. As such, any issue that Defendant's execution was constitutional on this basis was not preserved. Counsel cannot be deemed ineffective for failing to raise an unpreserved issue. *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. As such, this claim should be denied.

Even if the issue had been preserved, the claim should still be denied. In *Penry v. Lynaugh*, 492 U.S. 304 (1989), the Court indicated that execution of the mentally retarded was not unconstitutional. In *Thompson v. State*, 648 So. 2d 692 (Fla. 1994), this Court choose to follow the reasoning of the United State Supreme Court and rejected a claim that execution of the mentally retarded was unconstitutional under the Florida Constitution. As counsel cannot be deemed ineffective for

failing to raise a nonmeritorious issue, this claim should be denied. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

While the Legislature has recently enacted a statute exempting the mentally retarded from the pool of death eligible defendants, Ch. 2001-202, Laws of Fla., that law did not declare imposition of the death penalty upon the retarded unconstitutional and was not in effect at the time Defendant's sentence became final. The same would be true of any decision in *McCarver v. North Carolina*, 121 S. Ct. 1401 (2001), that might change the holding of *Penry*. Counsel cannot be deemed ineffective for failing to predict changes in the law. *Rutherford v. Moore*, 774 So. 2d 637, 644 (Fla. 2000); *Nelms v. State*, 596 So. 2d 441, 442 (Fla. 1992). As such, this claim should be denied.

Even if the imposition of a death sentence on a mentally retarded individual was unconstitutional, counsel would still not have been ineffective for failing to raise this issue. At resentencing, the evidence did not show that Defendant was retarded. Drs. Miller, Haber and Toomer testified that Defendant was not retarded. (RST. 493, 607, 696) Dr. Carbonell admitted that Defendant IQ score did not place him in the retarded range. (RSSR. 58) As the evidence did not show that

Defendant was retarded, counsel cannot be deemed ineffective for failing to claim that the imposition of the death penalty on him was unconstitutional because he was. *See Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

As part of this claim, Defendant asserts that the lower court erred in refusing to permit live rebuttal testimony from the inmates who had testified against Defendant at the time of trial. However, habeas is not the proper vehicle to raise this claim. First, a claim that the lower court excluded witnesses is a claim that could have and should have been presented on direct appeal. *Francis v. Barton*, 581 So. 2d 583 (Fla.), *cert. denied*, 501 U.S. 1245 (1991). It is inappropriate to use a habeas petition to raise such an issue. *State v. Riechmann*, 777 So. 2d 342, 364 n.22 (Fla. 2000). Moreover, trial counsel never sought to present live rebuttal testimony from these witnesses at resentencing. Thus, viewing this claim as a claim of ineffective assistance of appellate counsel would not entitle Defendant to any relief, as counsel cannot be ineffective for failing to raise an unpreserved issue. *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. Further, considering this claim as a claim of ineffective assistance of trial counsel is also unavailing. Claims of

ineffective assistance of trial counsel are appropriately raised in a motion for post conviction relief before the trial court; not a habeas petition in this Court. *Thompson v. State*, 759 So. 2d 650, 668 n.13 (Fla. 2000). As such, this claim should be denied.

III.

COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE AN ISSUE REGARDING DR. MILLER'S TESTIMONY.

Defendant next asserts that his appellate counsel was ineffective for failing to raise an issue regarding the admissibility of Dr. Miller's testimony at resentencing. Defendant appears to allege that Dr. Miller's testimony regarding his 1994 interview with Defendant should have been excluded because he had evaluated Defendant for the purpose of competency to stand trial. In the course of arguing this issue, Defendant also appears to assert that his trial counsel was ineffective for not insisting that new doctors be appointed to evaluate Defendant's competency and for allowing testimony regarding his competency to be admitted during resentencing. He also seems to be asserting that the trial court erred in not holding a competency hearing. However, these issues are procedurally barred and meritless.

Prior to resentencing, Defendant moved for a competency evaluation at a hearing at which the State was not present. (RST. 24) The trial court inquired as to which doctors had evaluated Defendant's competency previously. (RST. 24) Defendant indicated that Drs. Miller, Haber, Toomer and Carbonell had previously been appointed and stated that he would leave the selection of doctors to the trial court. (RST. 24)

The trial court then appointed the same doctors without objection by Defendant. (RST. 24)

The State later returned to the trial court because Defendant was refusing to see Dr. Miller. (RST. 30) Defendant then indicated that Dr. Toomer and another doctor had already evaluated Defendant's competency and that Dr. Toomer had found Defendant competent. (RST. 30) As such, Defendant did not see a need for Dr. Miller to evaluate his competency. (RST. 30) The State then indicated that it wanted Dr. Miller to evaluate Defendant to rebut his claims of mitigation. (RST. 30-31) Defendant did not object to this evaluation. (RST. 31)

During resentencing, Dr. Miller testified that he first interviewed Defendant in January 1988. (RST. 483) He found no evidence of psychosis, schizophrenia or organic brain damage. (RST. 484-85) Dr. Miller stated that an IQ between 72 and 76 would not impair a persons ability to conform his conduct to the requirements of law and that a person with an IQ in that range could hold gainful employment. (RST. 485-87)

When Dr. Miller mentioned that he had conducted a recent interview with Defendant, Defendant objected, stating:

> I think that's appropriate, Your Honor, also just to state my objection earlier I object to Dr. Miller testifying with respect to any analysis that he did with [Defendant] in 1994 pursuant to this court[‘s] order several weeks ago permitting him to evaluate [Defendant] that Your Honor permitted him to do over

> the defense's objection that later turned out to be inappropriate. I want to make an objection and have him testify to it if Your Honor -- I anticipate Your Honor is going to deny it.

(RST. 487-88). The trial court denied the objection. (RST. 488)

Dr. Miller then testified that in his first interview with Defendant, he found that he had some ability to learn and has a reasonably good past memory. (RST. 488-90) Dr. Miller stated that Defendant had claimed to have been grazed by a bullet on his right temple. (RST. 490) As a result, he was taken to the emergency room, treated and released.[2] (RST. 490-91)

During the examination the week before trial, Dr. Miller again found no evidence of mental illness. (RST. 493) He found Defendant was in contact with reality. (RST. 493) Dr. Miller had not tested Defendant's intelligence but stated that "[i]f it was less than average, I would inquire about it." (RST. 493) Dr. Miller found that Defendant had the ability to conform his conduct to the requirements of the law and that he suffer from no emotional disturbance. (RST. 494-96) Dr. Miller found that the facts of the crime were not inconsistent with someone with an IQ between 72 and 76. (RST. 496-98) Dr. Miller also stated that Defendant was aware of the wrongfulness of his conduct. (RST. 498-99)

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[2] Defendant's mother and sister confirmed this information. (RST. 539, 568)

Dr. Miller stated that he had found Defendant to be of average to borderline intelligence and felt that was consistent with Dr. Carbonell's IQ score of 75. (RST. 509-10) Dr. Miller stated that Defendant had said he had not done well in high school and that his abusive father had left the family when Defendant was 10 years old. (RST. 514) Dr. Miller stated that blows to the head could have caused brain injury. (RST. 514-15) However, Defendant had denied any head trauma other than the grazing wound. (RST. 514)

After Dr. Carbonell's testimony was read, the State noted that Dr. Carbonell's testimony raised issues of competency and asked the trial court to instruct the jury that competency was not an issue for its consideration. (RST. 585-86) Defendant responded that he had no intention of raising competency with the jury in closing and that those portions of her testimony could not be excised because it was intertwined with her testimony regarding the mental mitigators. (RST. 586) The trial court agreed to inform the jury about competency. (RST. 586) The trial court instructed the jury that Defendant had been found competent and that the issue was not before them. (RST. 593) When Dr. Haber discussed the issue of Defendant's competency, Defendant did not object. (RST. 694, 699-700, 702-03)

With regard to the admissibility of Dr. Miller's testimony about his 1994 evaluation of Defendant, Defendant appears to assert that appellate counsel should have asserted that this testimony was inadmissible under Fla. R. Crim. P. 3.211(e) because it was derived from a report on competency and related solely to that issue. However, Defendant did not object to Dr. Miller's testimony on these grounds at trial. When the issue came up, Defendant stated that he was object on the grounds he had previously raised. (RST. 487-88) The grounds that had previously been raised were that since two doctors had already found Defendant competent, no additional evaluation was necessary. (RST. 30) It was not that any testimony that Dr. Miller might offer was deprived from a report on competency and dealt solely with that issue. As such, this issue was unpreserved. *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982)(objection must be based on same grounds raised on appeal for issue to be preserved). Appellate counsel cannot be deemed ineffective for failing to raise a unpreserved issue, and this claim should be denied. *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

Even if the issue had been preserved, counsel could still not be deemed ineffective for failing to raise this issue because it was meritless. *Kokal*, 718 So. 2d at 143; *Groover*, 656

So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. Pursuant to Fla. R. Crim. P. 3.211(e), the limitations on the use of competency evidence is:

> (1) The information contained in any motion by the defendant for determination of competency to proceed or in any report of experts filed under this rule insofar as the report relates solely to the issues of competency to proceed and commitment, and any information elicited during a hearing on competency to proceed or commitment held pursuant to this rule, shall be used only in determining the mental competency to proceed or the commitment or other treatment of the defendant.
>
> (2) The defendant waives this provision by using the report, or portions thereof, in any proceeding for any other purpose, in which case disclosure and use of the report, or any portion thereof, shall be governed by applicable rules of evidence and rules of criminal procedure. If a part of the report is used by the defendant, the state may request the production of any other portion of that report that, in fairness, ought to be considered.

However, this provision was inapplicable to Dr. Miller's testimony, as he did not evaluate Defendant for competency under this rule and his testimony was not related competency.

After Defendant asserted that no further competency evaluations were necessary, the State requested, without objection by Defendant, that Dr. Miller be permitted to evaluate Defendant for the purpose of rebutting mitigation. (RST. 30-31) The trial court permitted Dr. Miller to evaluate Defendant on this basis. (RST. 31) In *Dillbeck v. State*, 643 So. 2d 1027, 1030-31 (Fla. 1994), this Court determined that it was proper to

order a defendant who was planning to present mental mitigation to be examined by the State's mental health expert and to admit testimony resulting from that examination. As this was the basis on which Dr. Miller actually evaluated Defendant, and his testimony, as seen above, did related to the mental mitigation evidence presented by Defendant, the lower court did not abuse its discretion in admitting Dr. Miller's testimony. *See also Long v. State*, 610 So. 2d 1268, 1275 (Fla. 1992)(testimony of mental health expert properly admitted, where defense counsel knew that counsel was evaluating defendant for issues other than competency before evaluation took place). As this issue is meritless, appellate counsel cannot be deemed ineffective for failing to raise it, and this claim should be denied.

With regard to the issues of trial counsel's alleged ineffective and the alleged error of the trial court, these issues are not cognizable on state habeas. Issues regarding trial counsel's ineffective are properly raised in a motion for post conviction relief in the trial court. *Thompson v. State*, 759 So. 2d 650, 668 n.13 (Fla. 2000). Moreover, habeas may not be used as a vehicle to obtain a second appeal. *State v. Riechmann*, 777 So. 2d 342, 364 n.22 (Fla. 2000). As such, these claims should be denied.

Even if the issue were cognizable, the claim should still

be denied. With regard to the alleged ineffective of trial counsel, Defendant does not explain how the appointment of different experts would have affected the outcome of the proceedings, particularly considering that the one expert who was named as having evaluated Defendant's competency in 1994 was a defense expert. Defendant also does not explain how he was prejudiced by the admission of evidence regarding his competency was prejudicial to Defendant. As it is necessary to allege both that counsel was deficient and that the deficiency prejudiced Defendant in order to plead a sufficient claim of ineffective assistance of counsel, this claim should be denied. *Strickland v. Washington*, 466 U.S. 668 (1984); *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998)(claim must state sufficient factual basis).

With regard to the failure to hold a competency hearing, the record reflects that trial counsel moved for a determination of competency because he believed it was incumbent on him to based on the allegation raised in the first post conviction motion and because being on death row "could make anybody crazy." (RST. 19, RSR. 85-87) The trial court noted that it had already held a hearing regarding the allegations in the first post conviction motion but did order new evaluations. (RST. 19, 24) After Defendant had been found competent by two doctors, counsel

indicated that he would not be pursuing the issue further. (RST. 30) Under these circumstances, the lower court was not required to hold a hearing on Defendant's competency. *See Hall v. State*, 742 So. 2d 225, 230 (Fla. 1999)(where defendant had previously been found competent and no new evidence of incompetency was presented, no duty to hold hearing on issue); *Pardo v. State*, 563 So. 2d 77, 79 (Fla. 1990)(where competency hearing not requested and experts found defendant competent, no error in not holding hearing); *Card v. State*, 497 So. 2d 1169, 1174-75 (Fla. 1986)(no error in failing to hold competency hearing, where experts were appointed and found defendant competent). This claim should be denied.

IV.

COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO ARGUE THAT THE AUTOPSY PHOTOGRAPHS SHOULD NOT HAVE BEEN ADMITTED AND THE ISSUE REGARDING THE JUDGMENT OF ACQUITTAL IS PROCEDURALLY BARRED AND MERITLESS.

Defendant next asserts that his appellate counsel after resentencing was ineffective for failing to raise an issue regarding the denial of a standing objection to the autopsy photos. Defendant also contends that his original appellate counsel was ineffective for failing to contend that the lower court improperly denied the motion from judgment of acquittal. However, the issue regarding the autopsy photograph was not preserved and was meritless. The issue regarding the conduct of Defendant's appellate counsel on his initial appeal is barred and meritless.

With regard to the autopsy photographs, immediately before opening statements, Defendant moved for a standing objection to the introduction of autopsy photos on the grounds that motive was no longer at issue. (RST. 239) The trial court refused to grant a standing objection but agreed to revisit the issue at the time the photos were introduced. (RST. 239) At the time the photographs were admitted, Defendant did not object. (RST. 460-73) Thus, any issue regarding the admission of the autopsy photographs was not preserved. *Castor v. State*, 365 So. 2d 701

(Fla. 1978). As such, appellate counsel cannot be deemed ineffective for failing to raise this issue. *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. This claim should be denied.

Even if the issue had been preserved, appellate counsel would still not have been ineffective. The test for the admissibility of autopsy photographs is relevance. *See Rose v. State*, 26 Fla. L. Weekly S210 (Fla. Apr. 5, 2001). Here, the autopsy photographs were admitted to show the manner in which Svenson was killed. This included the facts that Svenson was initially shot twice in the chest and was grazed in the back of his head by a hidden assailant, that Svenson then ran away from Defendant before being shot four more times in the head and once in the spine, and that the number of shots fired required that the gun had to be reloaded. These facts were relevant to CCP. *See Phillips v. State*, 476 So. 2d 194, 197 (Fla. 1985). As such, the lower court would not have abused its discretion in admitting these photographs had Defendant raised this issue. *See Teffeteller v. State*, 495 So. 2d 744 (Fla. 1986); *see also Ray v. State*, 755 So. 2d 604, 610 (Fla. 2000)(admission of evidence reviewed for abuse of discretion. Thus, appellate counsel cannot be deemed ineffective for failing to raise this nonmeritorious issue, and the claim should be denied. *Kokal*, 718

So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

With regard to the claim that Defendant's counsel on his first direct appeal was ineffective, this claim is procedurally barred. Defendant filed a prior habeas petition regarding the conduct of his first appeal, which was denied by this Court. *Phillips v. Dugger*, 515 So. 2d 227 (Fla. 1987). "Successive habeas corpus petitions seeking the same relief are not permitted nor can new claims be raised in a second petition when the circumstances upon which they are based were known or should have been known at the time the prior petition was filed." *Johnson v. Singletary*, 647 So. 2d 106, 109 (Fla. 1994). Here, the fact that counsel on Defendant's first appeal did not raise the denial of the motion for judgment of acquittal is sometime that Defendant could and should have known at the time he filed his 1987 habeas petition. As such, this claim is barred and should be denied.

Even if the issue was properly before this Court, the claim should still be denied. Counsel cannot be deemed ineffective for failing to raise a meritless issue. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. At the original trial, Defendant moved for a judgment of acquittal, asserting that the

circumstantial evidence did not show that he had committed the crime and only showed that Defendant “had a thing for” his probation officer and that the inmates who had testified to admission by Defendant to having committed the crime were incredible. (D.A.T. 969-70) However, the credibility of witnesses is an issue for the jury to decide and not a proper basis for a judgment of acquittal. *See Donaldson v. State*, 722 So. 2d 177, 182 (Fla. 1998); *Carter v. State*, 560 So. 2d 1166, 1168 (Fla. 1990). As such, appellate counsel cannot deemed ineffective for failing to raise this meritless issue, and the claim should be denied.

CONCLUSION

For the foregoing reasons, the petition for writ of habeas corpus should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to William M. Hennis, III, Assistant CCRC, 101 N.E. 3rd Avenue, Suite 400, Ft. Lauderdale, Florida 33301, this 4th day of September, 2001.

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SANDRA S. JAGGARD
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is type in Courier New 12-point font.

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